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No. 90-1419

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

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NATIONAL RAILROAD PASSENGER CORPORATION

and

CENTRAL VERMONT RAILWAY, INC.,
*Petitioners,*

v.

BOSTON AND MAINE CORPORATION, *et al.*,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## BRIEF OF RESPONDENT STATE OF VERMONT IN SUPPORT OF PETITIONER

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## QUESTIONS PRESENTED

1. Whether the majority of a divided panel for the United States Court of Appeals for the District of Columbia Circuit erred in holding that the National Railroad Passenger Corporation's ("Amtrak's") authority, under § 402(d) of the Rail Passenger Service Act (RPSA), 45 U.S.C. § 562(d), to condemn railroad property "required for intercity rail passenger service" limits Amtrak to condemning only that property that Amtrak retains for its own use, where that holding (a) strips Amtrak of the crucial bargaining leverage Congress gave it in negotiating with private railroads over whose facilities Amtrak must operate, (b) conflicts with the Second Circuit's construction of precisely the same language in a companion provision of the RPSA, and (c) conflicts with the authoritative interpretation of the statute by the agency charged with administering it.

2. Whether the majority below erred in refusing to apply, on petition for rehearing, amendments to the RPSA that Congress passed for the express purpose of overturning the majority's initial decision in this case.

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## BRIEF OF RESPONDENT STATE OF VERMONT IN SUPPORT OF PETITIONER

### BACKGROUND

The State of Vermont, an intervenor-respondent below, supports the petition filed by National Railroad Passenger Corporation ("Amtrak") and Central Vermont Railway, Inc. ("CV"). From 1972 until April 1987, Amtrak operated the *Montrealer*, a passenger train that ran from Washington, D.C. to Montreal, Canada via Massachusetts, Vermont and New Hampshire. During its 15-year run, the *Montrealer* served as the sole passenger line linking Vermont to Canada, and to the northeastern United States seaboard between Boston and Washington, D.C.

As such, it carried thousands of residents and tourists in and out of Vermont and other New England states. Pet. App. 128a.

In the early 1980s, Amtrak's service on the route began to deteriorate due to maintenance deficiencies on a 48.8 mile stretch of the Connecticut River Line ("Conn River Line") owned by respondent Boston and Maine Corporation ("B&M"). Under a 1977 operating agreement, B&M was obligated to maintain the Conn River Line in a condition that permitted the *Montrealer* to operate at certain prescribed speeds, and Amtrak agreed to make maintenance payments in return for the specified maintenance level B&M was to provide. This arrangement proved satisfactory until 1983 and 1984, when Guilford Transportation Industries, Inc. ("Guilford") purchased the B&M and the Delaware and Hudson Railway Company ("D&H"), which operated track paralleling the Conn River Line. Thereafter, B&M began routing traffic over the D&H line and allowed its portion of the Conn River Line to fall into disrepair. By 1987, when Amtrak was forced to discontinue *Montrealer* service, average transit time over B&M's portion of the Conn River Line had increased 67% over 1981 levels, and 47 of the segment's 49 miles were subject to speed restrictions; indeed, during the last 11 months of *Montrealer* service, not one train met its contractually agreed upon schedule.

Amtrak expressed its concerns over the deterioration of the Conn River Line in a number of meetings and discussions with Guilford officers and staff in 1985 and 1986. Guilford made clear, however, that, given the availability of the parallel freight route over the D&H track, B&M did not need to upgrade or maintain the Conn River Line and had no intention of spending significant funds to do so. Indeed, in 1987 Guilford slated B&M's portion of the Conn River Line for possible abandonment.

Following discontinuance of the *Montrealer* in April, 1987, Amtrak invoked arbitration to compel B&M to live



up to its obligations under the 1977 operating agreement. B&M responded by terminating the contract and contesting the jurisdiction of the arbitrators. After Amtrak prevailed on the merits of its claims, B&M fought enforcement of the arbitration award.

In the meantime, Congress appropriated $5 million for the express purpose of enabling Amtrak to upgrade the Conn River Line and re-institute *Montrealer* service.[1] As a result, Amtrak sought to settle its differences with Guilford in a manner that would permit resumption of passenger service over the B&M portion of the line. Guilford, however, was unwilling to give assurances that it would provide long-term maintentance of the line, and in fact stated that it was considering abandoning the segment.[2]

Thereafter, Amtrak began examining the possibility of invoking its special power of eminent domain that Congress conferred in the Rail Passenger Service Act ("RPSA"). Section 402(d) of that Act permits Amtrak to acquire through condemnation "property (including interests in property) owned by [another] railroad and required for intercity rail passenger service" by applying to the ICC for an order establishing Amtrak's "need . . . for the property at issue and requiring the conveyance thereof" to Amtrak on just and reasonable terms. 45 U.S.C. § 562(d). Amtrak's need for such property is *presumed* to be established unless the Commission finds that conveyance of the property would significantly impair the condemnee's ability to fulfill its common carrier

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[1] Supplemental Appropriations Act, 1987, Pub. L. No. 700-71, 101 Stat. 391, 447-48 (July 11, 1987).

[2] On March 24, 1988, two days *after* Amtrak filed formal notice that it was invoking its condemnation powers to acquire B&M's portion of the Conn River Line, B&M filed an amended System Diagram Map with the Interstate Commerce Commission ("ICC" or "Commission") that removed this portion of the line from its list of tracks and facilities potentially subject to abandonment.

obligations *and* that Amtrak's obligation to provide efficient and economical rail passenger service "can adequately be met by the acquisition of alternative property (including interests in property) which is available for sale on reasonable terms to [Amtrak]," or is available by virtue of Amtrak's § 305(d) authority to condemn non-railroad property. *Id.* § 562(d)(1)(B).

Because Amtrak lacked funds to purchase, rehabilitate, and maintain the line, it entered into an agreement with CV whereby Amtrak would condemn B&M's interest in the segment and transfer it to CV (with Amtrak retaining operating rights) in exchange for the latter's agreement to upgrade the property promptly (at a cost to Amtrak of no more than $3.1 million) and to operate the segment on terms acceptable to Amtrak. This agreement met Amtrak's legitimate objectives by 1) securing the use of a properly maintained line for the *Montrealer* and 2) providing an assurance of future maintenance of that line 3) at reduced expense to the federal government.[3]

The State of Vermont, which was intimately familiar with the history of problems surrounding B&M's segment of the Conn River Line[4] and desirous of seeing interstate and international passenger service to Vermont resumed, strongly supported the Amtrak-CV agreement. Vermont not only intervened, along with Massachusetts and New Hampshire, in the administrative and subsequent judicial proceedings, it provided CV with over

[3] The transaction satisfies the statutory requirement of not significantly impairing the condemnee's ability to fulfill its common carrier obligations by granting B&M trackage rights over the line for its freight train operations.

[4] This familiarity stemmed, in part, from the State's investigation of a series of freight derailments on B&M's portion of the Conn River Line.



$870,000 to help pay for the acquisition of the line and over $265,000 for the rehabilitation of the line.[5]

Following ICC approval of Amtrak's acquisition and transfer of B&M's segment of the Conn River Line, a divided panel of the District of Columbia Circuit ruled that § 402(d) "unambiguously" precludes Amtrak from condemning an interest in railroad property that Amtrak does not intend to retain. Reasoning that the "statute contemplates that the property acquired by condemnation must be required by Amtrak for *its* use, as it alone is engaged in intercity rail passenger service,"[6] the majority concluded that, because Amtrak did not intend to retain the fee simple interest it had condemned, that interest could not be "required for intercity rail passenger service." Pet. App. 18a.[7] Rather, the majority observed, what Amtrak really needs is use of B&M's segment of the line in a condition suitable for passenger rail service. *Id.* Because, the majority believed, Amtrak could obtain use of the line through the less drastic means of 1) condemning an easement in B&M's property that would allow Amtrak to maintain the line or 2) compelling B&M to grant Amtrak trackage rights pursuant to § 402(a) of the RPSA, the majority held that Amtrak

[5] See Vt. Acts (1987 Adj. Sess.) No. 211, Sec. 5 (eff. May 26, 1988). The State's provision of such funding is consistent with the assistance it had provided in the late 1970s to help B&M improve track and related equipment along the Conn River Line, and with the State's grade crossing improvements program, which had historically assigned special priority to Amtrak routes.

[6] See Pet. App. 17a (emphasis in original).

[7] The majority repeated this conclusion throughout its opinion. See Pet. App. 15a ("the Act does not permit Amtrak to take property . . . for which it concededly has no need itself"); *id.* 23a (the ICC's "construction of the phrase 'required for intercity rail passenger service' contravenes the plain meaning of section 402(d) as it allows the taking of property that was neither needed nor even wanted by Amtrak").

must exhaust these lesser remedies before resorting to condemnation of a fee simple interest.

While the case was still pending before the Court of Appeals on rehearing, Congress amended the RPSA specifically to permit the transaction contemplated by the Amtrak-CV agreement. The Independent Safety Board Act Amendments of 1990, Pub. L. No. 101-641, § 9(a), 104 Stat. 4654, 4658 (November 28, 1990), permit Amtrak to "subsequently convey title or other interest in [Amtrak-condemned] property to a third party, if such reconveyance is found by the [ICC] to further the purposes of [the RPSA]." Congress, moreover, expressly made this provision applicable to the still-pending proceeding before the Court of Appeals. On rehearing, however, the panel majority concluded that the amendment did "not affect the requirement that the property that is subsequently conveyed may not be condemned in the first place if it is not 'required for intercity rail passenger service.'" Pet. App. 3a.

## ARGUMENT

The decision below thwarts Vermont's efforts to regain the benefits of interstate passenger rail service. In rendering that decision, the panel majority flouted an unambiguous directive from Congress; substituted its interpretation of the governing statute for the ICC's presumptively authoritative interpretation; created a conflict among the circuits; and stripped Amtrak of its leverage in negotiating with railroads over whose lines it must run. Each of these untoward results is the product of the majority's unjustifiably narrow view of the property interests that Amtrak may "requir[e] for intercity rail passenger service." 45 U.S.C. § 562(d)(1). This Court must grant the petition in order to ensure that Amtrak is capable—as Congress unquestionably intended it to be—of acquiring and transferring property interests that enable it to provide "modern, efficient, and economical rail passenger service." *Id.* § 562(d)(1)(B).



1. The decision below hinges on the majority's determination that the property, or interests in property, that Amtrak "require[s] for intercity rail passenger service" is necessarily defined as that property, or those interests, that Amtrak condemns and *retains for its own use*. This construction of the phrase "required for intercity rail passenger service," which conflicts with the Second Circuit's interpretation of precisely the same language in a companion provision authorizing Amtrak to condemn non-railroad property (see 45 U.S.C. §545(d)), effectively robs Amtrak of the crucial leverage Congress gave it in negotiating with recalcitrant railroads over whose lines Amtrak must operate. Neither the language nor structure of the statute "unambiguously" compels this limitation on Amtrak's condemnation power and the resulting impairment of Amtrak's ability to provide efficient and economical service throughout the nation.

The RPSA nowhere defines the phrase "required for intercity rail passenger service," nor is this language self-defining. The majority nevertheless found § 402(d) "clear enough" in its command "that the property acquired by condemnation must be required by Amtrak for *its* use." Pet. App. 17a (emphasis in original). As the facts of this very case make clear, however, even the majority's definition of Amtrak's "needs" does not preclude Amtrak from subsequently transferring a fee simple interest that it condemns.

Here, Amtrak "used" B&M's fee simple interest in the Conn River Line—by transferring that interest to CV—to obtain a guarantee that the line in which it was going to invest over $3 million for rehabilitation would be maintained in a condition suitable for passenger service. This use of B&M's property interest, morever, was clearly necessary to Amtrak's acquisition of properly-maintained tracks. Had Amtrak sought, pursuant to its § 402(a) authority (see 45 U.S.C. § 562(a)), to compel trackage rights over B&M's portion of the Conn River Line, it would have

gained no greater assurance of proper maintenance than it had possessed under its 1977 Operating Agreement with B&M. B&M's willingness to breach its maintenance obligations under that contract, and to terminate the contract when Amtrak sued for specific performance, readily demonstrated the futility of employing this less drastic statutory remedy. Nor would it have sufficed to condemn an easement in B&M's property. To begin with, at the time Amtrak exercised its § 402(d) powers, B&M had designated its portion of the Conn River Line for abandonment. Moreover, condemnation of an easement in property that B&M had consistently refused to maintain would have left Amtrak with all the burdens of owning the track without the full benefits of ownership. Given its statutory duty to "[e]xercise [its] best business judgment" (45 U.S.C. § 501a(1)), Amtrak properly rejected this unacceptable alternative.[8]

Thus, Amtrak indisputably "used" the fee simple interest it condemned to obtain properly-maintained tracks, without which it cannot provide efficient and economical passenger service. That this "use" did not also involve "retention" of the interest condemned made it no less necessary, or "required," for intercity passenger service.

Indeed, the Second Circuit has recognized that intercity rail passenger service may require the condemnation of property interests that Amtrak itself does not retain. In *National R.R. Passenger Corp.* v. *Two Parcels of Land*, 822 F.2d 1261 (2d Cir.), *cert. denied*, 484 U.S. 954 (1987) Amtrak condemned non-railroad property,

[8] The majority's imposition of a "lesser interest" requirement when Amtrak acts pursuant to subsection (d) cannot possibly be justified, as the majority suggested (see Pet. App. 22a), by the "interplay" of subsection (a) and (d). Once the ICC determines that statutorily-compelled trackage rights are inadequate to meet Amtrak's needs, any limiting effect that subsection (a) supposedly exerts over subsection (d) is clearly at an end. Thus, the requirement that Amtrak condemn lesser interests is clearly an extra-statutory policy choice that the majority simply imposed on Amtrak.



pursuant to § 305(d),[9] and reconveyed it to the City of New London, which in turn used the land for a public service road. Amtrak retained only an easement in the property that permitted it to use the road for access to, and inspection and maintenance of, certain of its facilities. Like the majority below, the condemnee argued that, while Amtrak was free to condemn property for its own service road, it could not do so for the City of New London. *Id.* at 1265. Noting Amtrak's duty to minimize its need for federal subsidies and to encourage third parties to share in the costs of rail passenger service, the Second Circuit found "no impropriety in Amtrak's condemnation of property within the scheme of an overall cooperative agreement with New London . . . whereby the service road, the need for which is unchallenged, is maintained by New London." *Id.*

The majority's construction of the phrase "required for intercity rail passenger service" is flatly inconsistent with the Second Circuit's interpretation of precisely the same language in *Two Parcels*. In both cases, Amtrak unquestionably needed to use certain physical property (a service road in *Two Parcels*, a segment of the Conn River Line, here), condemned a fee simple interest in that property, and conveyed that interest to a third party in exchange for that party's agreement to maintain the physical property.[10]

[9] Section 305(d) provides, in relevant part, that Amtrak may "acquire any right-of-way, land, or other property [except that of a railroad, State, or governmental agency], which is required [for] intercity rail passenger service[,] by the exercise of the right of eminent domain." 45 U.S.C. § 545(d)(1)(B).

[10] The majority mistakenly suggests that *Two Parcels* can be distinguished on the ground that there Amtrak condemned an easement. Pet. App. 2a. There as here, however, Amtrak condemned a fee simple interest which it did not retain. Nor does it matter that the cases involved different provisions of the RPSA, for "identical words used in different parts of the same act are intended to have the same meaning." *Sorenson* v. *Secretary of the Treas-*

This clear conflict among the circuits, moreover, is of more than merely passing academic interest. Although Amtrak has invoked its condemnation powers only sparingly, the possibility of invocation is—as Congress undoubtedly intended it to be—an important aspect of the context in which Amtrak negotiates with private freight railroads. Congress expected that, rather than build its own network of tracks, Amtrak would operate over the tracks and facilities of other railroads; Congress therefore urged private railroads to cooperate with Amtrak (45 U.S.C. § 501(b)) and to share in the costs of its rail passenger services. *Id.* § 501a(2). Recognizing that these exhortations might not be sufficient to ensure the modern, efficient, and economical service it envisioned, Congress conferred on Amtrak its unique condemnation powers, which give Amtrak the leverage it needs to deal with recalcitrant railroads such as B&M.

The decision of the majority below strikes at the heart of the bargaining power Congress intended Amtrak to have vis-a-vis the private freight railroads whose facilities it must use, by emasculating Amtrak's ability to obtain the property and rights it requires for its passenger service. Indeed, B&M's willingness to abandon a segment of track it was contractually obligated to maintain for Amtrak's use, and to insist that Amtrak condemn an easement in that property and pay for maintenance that B&M itself refused to undertake, demonstrates the types of difficulties Amtrak may face if the decision below is allowed to stand. This Court should grant the petition in order to resolve the split of authority in the circuits and clarify that Amtrak may condemn interests in property that it does not retain, where the condemnation and

*ury*, 475 U.S. 851, 860 (1986) (citations omitted); see also *Morrison-Knudsen Constr. Co.* v. *Director, Office of Workers' Compensation Programs*, 461 U.S. 624, 633 (1983) (same).



subsequent transfer of such interests is necessary to its provision of passenger service.[11]

2. The Second Circuit's decision in *Two Parcels* reveals yet another flaw in the decision below. Under the principles this Court established in *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the ICC's interpretation of a statute it is charged with administering is entitled to deference unless that interpretation is "contrary to clear congressional intent." *Id.* at 843 n.9. Of the six appellate judges that have considered the question, four (including Judge Ginsburg below) have concluded that the phrase "required for intercity rail passenger service" does not limit Amtrak to condemning only those interests in property that it retains for its own use. While the State of Vermont believes that the construction rendered by the Second Circuit (and Judge Ginsburg) is plainly the correct one, this division within the judiciary establishes, at a minimum, that the relevant statutory language is not so unambiguous as to admit of only one possible meaning. In circumstances such as these, *Chevron* required the court below to defer to the agency's clearly "permissible construction of the statute." *Id.* at 843.

Rather than do so, however, the majority engaged in a transparent attempt to circumvent *Chevron*'s requirements by manufacturing evidence of § 402(d)'s "unambiguous" meaning. Unable to identify any statutory language or legislative history demonstrating that "Congress has directly spoken to the precise question at issue" (*id.* at 842), the majority was forced to rely on 1) the

[11] All decisions of the ICC, which must approve Amtrak's exercise of its eminent domain powers, are reviewable in the District of Columbia Circuit, as well as in the court of appeals for the circuit in which an affected party "resides or has its principal office." 28 U.S.C. § 2343. The Commission itself, therefore, may be uncertain as to what law governs its review of Amtrak's use of § 402(d), given the split in authority and the Commission's inability to know, at the time of decision, which circuit will review its decision.

"interplay" of subsections (a) and (d) of the statute (Pet. App. 22a), neither of which even refers to, let alone expressly limits, the other; 2) a general congressional policy against cross-subsidization, even though the RPSA expressly encourages private sector support for passenger service (see 45 U.S.C. § 501a(2)) and there is no evidence in this case of any cross subsidy; 3) the absence of "a *clearer* statement from Congress that [it] intended" to permit Amtrak to condemn an interest it subsequently conveys (Pet. App. 21a (emphasis added)); and 4) a "colorable" constitutional question that "counsel[s] against imputing to Congress the intention to adopt the disputed meaning in the absence of some *clearer* evidence." *Id.* (emphasis added). As the foregoing recitation makes clear, the majority's determination that § 402(d) unambiguously *precludes* the ICC's interpretation is simply untenable. This Court should not countenance such a deliberate refusal to adhere to the standards of administrative review articulated in *Chevron*.

3. The State of Vermont believes that, for the reasons set forth above, the court's initial decision warrants review by this Court. The majority's remarkable response to congressional efforts to overturn that decision, however, provides yet another, entirely independent basis for review.

While the majority's initial decision was still subject to rehearing, Congress amended the RPSA specifically to provide that Amtrak "may subsequently convey title or other interest in [Amtrak-condemned] property to a third party, if such reconveyance is found by the [ICC] to further the purposes of this Act." Congress expressly made the amendment applicable to this case, [12]

[12] The amendment provided that it "shall apply to any proceeding instituted before, on, or after the date of enactment of this Act (including any such proceeding pending before any Federal court on such date of enactment.)" Pub. L. No. 101-641, § 9(b).



and the amendment's sponsor explained that the law was prompted by, and designed to correct, the majority's initial decision.[13]

Incredibly, having previously rejected the ICC's construction of the statute because of the supposed lack of "clear" evidence that Congress intended to permit Amtrak to condemn interests it subsequently conveys, the majority deemed this amendment *irrelevant to this case*. The majority attempted to justify its decision by asserting that the amendment only permits Amtrak to convey property "subsequent to a condemnation that is otherwise valid" (Pet. App. 3a.) (emphasis deleted); because Amtrak did not need B&M's fee simple interest in the first place, the majority held, the amendment could not have authorized Amtrak to reconvey that interest to CV. This facile reasoning cannot disguise the fact that, as the majority has defined it, Amtrak's "need" is limited to that property which it intends to *retain for its own use*. Accordingly, because a property interest that Amtrak intends to convey to a third party can never, under the majority's view, be "required for intercity rail passenger service," the amendment can *never* be employed, for any attempt to invoke it would reveal the invalidity of the initial condemnation.

This, of course, is not statutory construction but statutory nullification. Barring constitutional infirmity, judges are not free to decline to enforce laws that Congress sees fit to enact. That, however, is precisely what the majority has done here. The majority's patent disregard of an explicit and unequivocal legislative command

[13] See 136 Cong. Rec. S17668 (daily ed. October 27, 1990) (statement of Sen. Jeffords):

> A recent court decision has jeopardized the continued operation of Amtrak's only passenger train to Vermont by restricting its eminent domain authority. The new provision makes clear that the court misconstrued that authority when it questioned Amtrak's subsequent conveyance of the rail line it acquired.

is an extraordinary circumstance requiring the exercise of this Court's supervisory powers.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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